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IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

MICHAEL (MICKEY) COHEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD ON APPEAL

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MICHAEL (MICKEY) COHEN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. .....

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Fred M. Vinson, and to the Honorable Associate Justices of the Supreme Court of the United States:

YOUR PETITIONER, Michael Cohen, respectfuly petitions this Honorable Court to grant certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit affirming his conviction on four counts, three of which charged violations of Title 26, Section 145(b) and the fourth charged viola-

tion of Title 18, Section 1001. The court of appeals, writing an opinion on a single count of violation of Section 1001 affirmed the conviction on this and on the other three counts of violations of Title 26, Section 145(b) because it had affirmed the conviction on the one count.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 6, 1953. The petition for rehearing was denied February 5, 1953. The jurisdiction of this court is invoked under Title 28, Section 1254, subdivision 1, and Rules of Practice and Procedure in criminal cases promulgated by this Honorable Court.

STATUTES INVOLVED

Title 18, Section 1001, U. S. Codes:

> "§1001. Statements or entries generally.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 26 U. S. C. A., Section 145(b):

> (b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Legislative Reorganization Act of 1946, Public Law 601—79th Congress, Chapter 752—2d Session (S. 2177). Such power was provided in Section 134(a) of the Act. That section provides as follows:

> "SEC. 134(a). Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the session, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction,

may report such hearings as may be had by it, ..."

Title 2, U. S. C. A., Section 192, R. S. §102 provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony . . . refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment . . . for not less than one month nor more than twelve months."

The Fifth Amendment to the Constitution provides:

"Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

By Senate Resolution 202, 81st Congress 2d Session, the Kefauver Committee was formed. Section 3 of that act provides as follows:

"SEC. 3. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and to make such expenditures as it deems advisable."

Title 18, Section 3486:

"Testimony before Congress; Immunity.

"No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. June 25, 1948, c. 645, 62 Stat. 833."

Title 26, Section 3809, U. S. Codes:

In 1949, Congress passed Section 3809 of Title 26. This section provided as follows:

"SEC. 3809. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

"(a) Penalties.—Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

"(b) Signature Presumed Correct.—The fact that an individual's name is signed to a return, statement, or other document filed shall be *prima facie* evidence for all purposes that the return

statement, or other document was actually signed by him.

"(c) Verification in Lieu of Oath.—The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required."

(b) Section 51(d), 145(c), and 1630 of such code are hereby repealed.

(c) *The amendments made by this section shall be applicable with respect to any return, statement, or document filed after the date of the enactment of this Act."*

(U. S. Code, Congressional Service, 81st Congress, First Session, 1949, page 680.)"

SHORT STATEMENT OF THE FACTS

Your petitioner was a small time gambling figure in Los Angeles whose position was magnified by the television of the Kefauver Committee before which he was subpoenaed to testify. At the session of the Kefauver Committee (televised) his counsel objected to the proceedings and claimed immunity by reason of his testimony before it. This hearing took place on November 17, 1950. An Assistant United States Attorney sat at the Kefauver Committee investigation taking notes of the proceedings. Also there was produced under subpoena a document made and prepared by Harry Sackman, his tax auditor, and signed by Cohen at the request of two intelligence officers of the government, which became Exhibit 20 in the criminal trial, and which was called a "net worth statement," although in truth and in fact it was not a "*net worth*" statement but a document containing a statement of loans and expenditures.

Cohen was indicted subsequent to the Kefauver hearing on the charges herein contained and the Kefauver Committee in its report took credit for inquiring into its activities. Exhibit 20 which was produced Nov. 17, 1950 for the Kefauver Committee under the compulsion of a subpoenae was the basis of petitioner's conviction in his trial in 1951.

The indictment was of both the petitioner and his wife, but his wife was dismissed out of the case before its conclusion. (R. T. 1-8.)

Counts one, three and five of which petitioner was convicted charged violation of Section 145(b) of Title 26 (tax evasion counts for the years 1946, 1947, and 1948) and the other count, count six, charged making a false statement in a matter within the jurisdiction of the government, to-wit, in Exhibit 20 which he executed at the request of his auditor who turned the same over to the two intelligence officers of the Internal Revenue Department at the auditor's office, it is alleged that it contained a false statement. The indictment does not charge that the statement was material. The document was not one that was required to be made by the government; but was merely some figures prepared by appellant's tax auditor as to loans and expenditures of the petitioner during the years in question. The exhibit is published in full in our appendix to the brief in the Court of Appeals which has been sent to this court as a supplemental brief in support of this petition.

This document, Exhibit 20, had been produced under subpoena before the Kefauver Committee and used there. The questioning of that Congressional Committee related to the matters contained in Exhibit 20 and similar questions were later asked of him during the criminal trial.

Upon his subsequent indictment at Los Angeles, his attorney objected and asked to have the indictment dismissed and grant appropriate relief based upon the fact that Cohen had appeared before the Kefauver Committee as a witness before that Committee (R. 12) and that testimony had been listened to by government agents and would be used again in the trial. The mo-

tion was renewed at the end of the trial on motion for judgment of acquittal and denied.

N. E. Goodykoontz, an agent for the Internal Revenue Department, made a counter-affidavit in which he averred he had investigated the *Cohen* case and that the information which he presented to the court and jury had been independent of any information obtained by him through matters investigated by the Kefauver Committee. (R. 12-32). Mr. Ernest Tolin, then United States Attorney, also made an affidavit in which he averred that he read the complete testimony given by Michael Cohen before the Kefauver Committee on November 17, 1950, and that he did not use any information derived directly therefrom in connection with the indictment brought in this case, and that he did not intend to use any portion of the testimony in respect thereto. (R. 33, 34).

However, during the trial the basis for the indictment on count six (the false statement count) was Exhibit 20, which the Kefauver Committee had sent for and used for the basis of questioning Michael Cohen, and it was conceded before the Court of Appeals by the United States Attorney handling the case that three of these copies of Exhibit 20 had been made; that one had been brought before the Kefauver Committee and the other two were in the possession of the Internal Revenue Department and that that was the basis of its prosecution—the only count which the Court of Appeals discussed in its written opinion, holding that that was sufficient to affirm all counts.

The petitioner declared repeatedly not only before the Kefauver Committee but elsewhere that he had never evaded any income tax and that there was no sufficient proof of the same anywhere.

The government proceeded in the trial under the so-called "net worth-expenditure theory." It at no time showed that Michael Cohen had income in the taxable years that required him to pay any income tax beyond the amount which he declared and paid. Its claim that he was "broke" and therefore unable to make the expenditures was based solely upon the testimony of two police officers who had at one time arrested the petitioner in connection with gambling matters, who claimed that at that time (a period of two months before the period involved) that he had told them, "You have got me broke;" (R. Tr. 408, l. 11 to 413 l. 2), that he was operating a club known as the LaBrea Social Club in 1945, in which he said he had invested $60,000, and that the officers had beat him in a business way. The full testimony is set out at pages 46-47 of our Opening Brief in the Court of Appeals.

There was no other testimony to show that he didn't have the funds involved in any expenditures, and there was nothing to show that the petitioner had in any way evaded any income for those taxable years. These questions were very strenuously argued in the Court of Appeals, which in its opinion did not discuss these particular counts. Instead it discussed and upheld Count Six, the so-called false statement count. It further held that since one count was sufficient it did not have to go into the sufficiency of the evidence as

to the other counts—the tax evasion counts. Petetitioner contends that the failure of the Court of Appeavals to do so denies him the substantial right of appeal as t to those counts and leaves him branded as guilty of tax e evasion without sufficient evidence to support the conmviction.

During the trial of this case, the prosecuutor appeared at night on television with exhibits thhat had been introduced in the trial of the case during tthe daytime. These facts became a matter of public r record, when the trial judge in this case himself ttestified before the Senate Judiciary Committee at Los Angeles stating that he had seen the exhibits of the ttrial appearing on television. The Court of Appealss nevertheless held that this did not violate the apppellant's rights to a fair trial.[1] This question is new andd fundamental and has not been passed on by this courrt.

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[1]In a hearing before the Senate Judiciary Committee on April 117, 1952 the trial judge in this case testified as follows:

"SENATOR McCARRAN: There is one statement you mmade that is perhaps unclear in the record. Do you remember referring to s seeing something on television after a trial was over?

"JUDGE HARRISON: It was not after the trial was oover. It was during the trial. I saw a picture during the Cohen case of s some of the exhibits of the Cohen case, while the case was on trial befoore a jury—and the jury was free—of explaining exhibits on the blaeckboard and having it televised.

"SENATOR McCARRAN: Scenes that had not taken pblace?

"JUDGE HARRISON: No. They had occurred in the c court, or, in substance. But there was a re-enactment of the scene and aa blackboard before a television while the case was still on trial and the jurry, of course, was at large.

"SENATOR McCARRAN: You mean the jury was free to have witnessed that over television?

"JUDGE HARRISON: Yes. . . .

"SENATOR McCARRAN: . . . To my way of thinkiing, if I may express myself, your attitude in this is entirely right. I ddoubt the advisability of televising trials in the court room, for the veryy reason that you have suggested. It re-enacts to a jury at large and tto the public scenes that have taken place in the court room, and emphasizees them.

"In other respects it emphasizes a lot of things that sshould not be emphasized to the public. The public is at liberty to come to a court room and listen. That has always been the policy under the American plan, and I hope always will be. We don't have to feed it to them at the breakfast table and at supper and after supper."

Prior to the accusation against the appellant, two Internal Revenue Agents went to the office of the petitioner's tax counsel and asked petitioner's tax counsel to give them a "net-worth" statement of the petitioner. The petitioner had for ten years relied on his tax counsel to prepare his returns. The tax auditor wrote up a statement of loans and expenditures (which is Exhibit 20) and labeled it a "net worth statement," although it was not truly a net worth statement, and petitioner executed the document for his tax counsel, who then turned it over to the two internal revenue men. The statement was not verified, and it was not sworn to as provided for in Section 3809 of Title 26 as being certified as true under the pains and penalties of perjury, as provided in sub-section (c) of Section 3809 Title 26, but it was merely signed. It was and is the contention of the petitioner that Section 3809 of Title 26, passed by the 81st Congress in 1949, was and is a specific section dealing with false statements in the Internal Revenue Department and supersedes the general section 1001 in relation to any matter under the Internal Revenue Code covering prosecutions of anything that occurred in connection with Internal Revenue matters, and that unless the statement contained the provisions of Section (c) of section 3809, passed in 1949, that no offense had been committed and it was error to permit the introduction of Exhibit 20 or to convict the appellant.[2]

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[2]SEC. 3809. (Italics ours.)

"(a) Penalties.—Any person who willfully makes and *subscribes* any return, *statement*, or *other document*, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, 'The full section is set out under statutes, supra.' "

This is the only statute that specifically refers to subscribing or executing a document. Exhibit 20 was merely subscribed by the appellant.

The Court of Appeals held that Section 3809 was not meant to apply.

The indictment did not charge that the statement was material. The Fifth Circuit in *Rolland v. U. S.*, 200 Fed. (2) 678, held that such an allegation is necessary to state a public offense. The affirmation of the 9th Circuit we think creates a conflict in the circuits requiring a decision by this court to resolve it.

It was also the contention of the petition that Section 1001 of Title 18 was in any event meant to apply only to statements authorized or required to be made by some statute or regulation on suitable notice in a matter within the jurisdiction of a Department and not one that any investigator or police officer of any agency of the government may have to make inquiry on. We contended that *U. S. v. Gilliland*, 312 U. S. 86, so held. The Court of Appeals disagreed and sustained its position on the basis of *Marzani v. United States* (October Term 1948, No. 59) which was affirmed by equally divided court. That case involved a government employee, questioned first by the Civil Service, and later by his immediate superior in a matter within that Department..

It was also the contention of the petitioner that Exhibit 20 was solicited by the agents of the Bureau of Internal Revenue for the sole purposes of a prosecution and that it was in effect an entrapment and contrary to public policy. This was also overruled by the Court of Appeals, and also the petitioner's contention

that the word "use" as set out in Section 1001 U. S. Codes does not mean use by an intelligence officer of the Internal Revenue Department or some police officer of the department, and the word "use" has a specific and limited meaning.

QUESTION PRESENTED BY THIS APPEAL

1. Whether a statement not required to be made under any law, rule, or regulation and one made merely to a couple of investigators for the Internal Revenue Department is such a statement as falls within the purview of Section 1001 of Title 18, or whether such a statement is one that is required to be made under some statute, rule or regulation of the government and not any statement; also whether it has to be material.

2. Whether the false claims act (Section 1001, Title 18) was and is applicable under the facts of this case, and, if applicable, is constitutionally valid as construed and applied.

3. Whether Section 1001 of Title 18 was Constitutionally construed and applied in a private discussion with two intelligence officers of the Internal Revenue Department where there is no law, rule or regulation covering the matter and was initiated solely by the intelligence agent for the purpose of getting data leading toward a prosecution of the petitioner.

4. Whether Section 1001 of Title 18 is meant to apply to Internal Revenue matters since the passing of Section 3809 of the Internal Revenue Code in 1949,

and whether the provisions of that section, providing that any person who willfully makes and subscribes any return, . . . statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, which replaces Section 1001 and is a complete provision in the Internal Revenue Code covering any statements made within the jurisdiction of that department.

5. Whether televising by the prosecutor himself with explanations of the exhibits in the trial of the case was such a procedure as denied fair trial to the defendant under the Fifth Amendment to the Constitution of the United States.

6. Whether the petitioner by reason of compelled testimony before the Kefauver Committee and the production of Exhibit 20, before the Kefauver Committee was such testimony as thereby gave him immunity under the provisions of Section 3486 of Title 18 U. S. Codes, or at least prevented use of Exhibit 20 in the criminal trial.

7. Whether the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of the Court of Appeals for the Fifth Circuit which holds that an indictment is insufficient which fails to set out the matters are material.

In its construction of Section 1001 of Title 18, the Court of Appeals has held that the statements referred

to in this Statute do not have to be ones required to be made by some law or regulation. Chief Justice Hughes in the case of *Gilliland v. United States* (312 U. S. 86) held the statute constitution but he held in the *Gilliland* case that "the law was intended to apply only to presentation of affidavits and reports *required* by the subsequent act of February 22, 1935 (312 U. S. 95)." That Statute shows that Congress did not intend to form an omnibus statute for the prosecution of all matters for false statements made in matters required by some rule or regulation. Otherwise, there would be no notice to the citizen as to when he might be violating the law.

8. Whether the evidence as to each count was sufficient to support the verdict.

9. Whether an appellate court having before it four counts may affirm the judgment as to all four counts because it finds one count sufficient and whether, if this is the rule, it should not now be overruled in the light of the power of the trial court to modify sentences under Rule 35 Rules of Criminal Procedure for the District Courts of the United States following appeal decisions and the future consequences in any event of a conviction that is good as to four counts as against a conviction that is good as to only one count.[3]

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[3]Pertinent portion of Rule 35 "Correction or Reduction of Sentence, . . . The court may reduce a sentence . . . within 60 days after receipt by the court of a mandate issued upon the affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order denying of the Supreme Court denying an application for a writ of certiorari." If one count of a four count indictment is affirmed and three are actually reversed, the court might well consider reduction of sentence.

This affects parole consideration and also a defendant's future after imprisonment when a future employee wants to know if a man has committed four counts or one.

SUMMARY OF THE ARGUMENT

1. The indictment for violation of so-called False Claims Statute, Title 18, §1001, failed to state a public offense since the indictment failed to allege that the matters are *material*. In this respect the Ninth Circuit implicitly overruled this contention and held the indictment did state a public offense and is in conflict with the Fifth Circuit which in *Rolland v. U. S.*, 200 Fed. (2d) 678, which held that it is essential for the indictment under Section 1001 for the indictment to allege that the facts are *material*. The petitioner's indictment did not allege that the statements were material.

2. Section 1001 of Title 18 does not apply to matters in the Internal Revenue Department because Congress has specifically provided in Section 3809 adopted by the 81st Congress of 1949, that persons who make statements to the Internal Revenue Department are only liable if they make such statements under a declaration that they are made under the penalties of perjury and certify further that he believes them to be true as to every material matter. This section was intended to be all-inclusive under a complete system of the Internal Revenue Code. Under the rule of *Inclusio unius est exclusio alterius*, the only statement

made to the officers or agents of the Internal Revenue Bureau containing such declarations subject to any criminal penalty, Section 1001 was not intended to apply.

If Section 1001 of Title 18 is still meant to apply then that section was unconstitutionally construed and applied.

In *United States v. Gilliland,* 312 U. S. 86, the case involved affidavits and reports which were required to be made on approved forms to a Federal Tender Board established by the Secretary of the Interior, under regulations authorized by and for the enforcement of the "Hot Oil" Act. This court held that the false claims act was applicable to punish such statements if false, not only because the statements manifestly related to a matter within the jurisdiction of the department of the United States but also because,

> "The Statute cannot be deemed to be invalid because of indefinitement. The affidavits and reports required had been sufficiently described and the duty enjoined had been adequately defined. Anyone presenting the required affidavits and reports to the Board set up under the pertinent regulations were suitably charged with notice of the consequence of knowingly and wilfully including therein any false and fraudulent statements. . . . The Act of 1934 (the False Claims Act) with its provisions as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 (the Hot Oil Act) as well as to other stat-

utes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required."

This court has thus held in *Gilliland v. U. S.*, 312 U.S. 86, that to be constitutionally applicable, (1) Section 1001 must be a complement to some other statute or authorized regulation in aid of their enforcement. (2) That the other statute or regulations must require the making of a statement in a matter within the jurisdiction of the Department or agency of the United States. (3) The duty enjoined by such statute or regulation to make such statement, must be adequately defined, and (4) There must be suitable notice of the consequences if the required statements are false or fraudulent and knowingly and willfully made.

There is no rule or regulation requiring any person to make or execute such a document as Exhibit 20, given to the special intelligence agent of the Internal Revenue Department. In fact, there was no duty set forth by any statute or regulation to make or execute such document and there was no suitable notice of the consequences if the required document contained an item that was false or fraudulent.

We submit, respectfully, that the false claims statute, now Section 1001, was not applied in this case in conformity with these limitations. It therefore was not constitutionally applied in the instant case, and that the construction placed upon it by the Court of

Appeals for the Ninth Circuit is erroneous and a hearing should be granted in order to resolve this important matter.

In *United States v. Long,* 14 Fed. Supp. 29, the court held that a statement made voluntarily and not pursuant to some requirement or law was not included within the statute. (See Judge A. N. Hand's interpretation of this decision, in *United States v. Presser,* 99 Fed. (2d) 819, 822.)

In *Hamner v. United States,* 134 Fed. 2d 592, a conviction under Count One was reversed because the false statement which formed the basis of that count did not relate to anything which the pertinent regulation required to be stated.

This is in accord with the familiar principle that a false sworn statement is not punishable under the perjury statute, if not required to be made by a pertinent law or regulation. (See *United States v. Nickerson,* 58 U. S. 204; *1 Sprague,* 232 Fed. Cases No. 15878; *Williamson v. United States,* 207 U. S. 425, 108 A. L. R. 1242).

For the exception of the *Marzani* case, no case has been found in which a conviction has been upheld under the false claims act where the statement claimed to have been false was not required to be made by some law or regulation, or where some procedure was not established which imposed at least a conditional duty to make a statement because of the possible adverse consequences which might result from not making a

statement. The *Marzani* case was affirmed by a four to four decisions. Even in that case there was a relationship between the employer and employee within the department, and he had requested a hearing from his employer regarding matters that came up before the Civil Service Commission in reference to his loyalty.

In *United States v. Zavala*, 139 Fed. (2d) 830, the false statement was contained in a Customs declaration the making of which was required by regulations which was specifically called to the attention of the accused.

In *Spivey v. United States*, 109 Fed. (2d) 181, cirt. denied 310 U. S. the false statements were made as to the Commodity Credit Corporation's producers cotton notes given as security for loans under applicable regulations. To like effect, see *U. S. v. Hiney*, 149 Fed. (2d) 485; *United States v. Barrow*, 149 Fed. (2d) 489; *United States v. Lorenzo*, 151 Fed. (2d) 122.

In the *Barrow* case statements were made in an application for a certificate of identification required by presidential proclamation. In the *Lorenzo* case the statement was made in an application for federal employment subject to certification by the Civil Service Commission.

The decision of the Court of Appeals for the Ninth Circuit is therefore in conflict with the holding of this court in the case of *Gilliland v. U. S.*, 312 U. S. 86, and by the views expressed by an equally divided opinion in *Marzani v. U. S.*, 330 U. S. 545. October Term, 1948, No. 59.

3. The petitioner's testimony was compelled under the provisions of Title 2, Sec. 192, U. S. Code. The production of Exhibit 20 which formed the basis of the constitution under Count Six, had been produced before the Kefauver Committee under the compulsion of a subpoena. Questions had been asked solely in reference to the matters therin set forth and an Assistant U. S. Attorney in charge of tax prosecutions at Los Angeles was present taking notes during such proceeding. The use of any of such testimony is forbidden under Section 3486 of Title 18. The exemption occurred when Congress compelled its production; not because the Internal Revenue agents might have had other copies of the same evidence procured independently.

The compulsion to testify for the Kefauver Committee gives him constitutional immunity under the Fifth Amendment to the Constitution of the U. S. It was for Congress to decide whether it wanted to have immunity result and if it thought this testimony, including the televising thereof, was more important than having him prosecuted in the criminal court.

The Court of Appeal misinterpreted the case of the *U. S. v. Marzani,* 344 U. S. 43. That case did not raise the constitutional questions presented here.

5. The petitioner was entrapped into making statements for the purposes of a prosecution. Such entrapment is against public policy.

6. The exhibiting on television of court exhibits of the prosecution by the prosecutor during the trial of the case constituted such lack of procedural due process as to deny petitioner fair trial. It was not necessary for the petitioner to have proved the consequences thereof from such procedure. When the trial judge saw the exhibits on television himself it was his duty to have declared a mistrial. Petitioner was denied a fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

7. On counts one, three and five the burden of proof was unconstitutionally shifted to defendant in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. In this respect the case under this so-called expenditure method shifted the burden of proof to the defendant to prove that his expenditures were lawful. This is constitutionally not proper under the Fifth Amendment to the Constitution of the United States. See decision of Third Circuit.

8. The evidence is entirely insufficient to show any tax evasion or violation of either 145a or 145b of Title 26. It is entirely insufficient to show that he made a false statement in violation of Section 1001, Title 18, U. S. Codes. Executing a document prepared by someone else, even if it contains one false item, is not *making* a statement within the meaning of

the statute. The indictment must allege that the matters are material and the proof must conform.[4]

9. The trial court erred in permitting government agents to testify, as to their calculations regarding Exhibit 210a, when they admitted that some of the items which they included in this exhibit as evasions of tax included erroneous calculations of monies which were actually loaned and received by the petitioner without any dispute. *(Kirsh v. U. S.,* 174 F. (2) 595, 601.)

10. We incorporate and readopt all the points set out in our brief in the District Court of Appeals for the Ninth Circuit as though hereinafter specifically set out as they are contained in our brief in the Court of Appeals which we have filed in this court as additional points and as grounds for granting a certiorari.

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[4]On January 3, 1950 Agents Goodykoontz and Spears of the Internal Revenue Bureau went to appellant's tax auditor and asked him if petitioner's net worth statement was ready. The document prepared by Sackman was produced. Sackman handed petitioner what later became Exhibit 20 and asked him to sign it. Petitioner signed it and Sackman then gave it to Goodykoontz and Spears at Sackman's office. The document already prepared by Sackman was merely executed by petitioner. (R. T. 126.) The document was not the "making" of any statements. The use of the document, if an offense, could only be one under the first part of Section 1001 which requires an allegation that the statements are material.

REASONS FOR GRANTING CERTIORARI

I.

Certiorari should be granted to resolve the conflict between the decision of the Court of Appeals for the Ninth Circuit and the decision of the Fifth Circuit.

II.

Section 1001 has no application in view of the passage by the 81st Congress of 1949 of Section 3809, Title 26.

Section 3809 of Title 26 was meant to repeal not to limit the application of Section 1001 of Title 18 in internal revenue matters. Congress in passing Section 3809 included the word "statement" which had not been in any of its previous enactments. Thus, any statement made to an internal revenue agent in any matter connected with the Internal Revenue Department which contains a statement that it is made under the pains and penalties of perjury and that the person swears that the same is true forms the foundation for a prosecution. Thus, if the instant statement had contained such an assertion (the Act having recently been passed, prior to January 3, 1950) the petitioner would have been liable; but since it did not contain such an allegation, there was no offense committed. Even though the indictment contained the heading U. S. C. Title 18, Section 1001, this did not necessarily mean that the prosecution had to be brought under that section or was being carried on under that section.

This charge did not state an offense because it did not allege that the statement contained an assertion that it was made under the pains and penalties of perjury and that the signer believed it to be correct as to every material matter. Under the doctrine of *inclusio unius est exclusio alterius* the section was meant to apply to all matters within the Internal Revenue Department.

This section was meant to apply to any statements made within the scope of Internal Revenue matters. This is a new and important question never passed on by this Honorable Court.

III.

Section 1001, Title 18, if meant to apply, was unconstitutionally construed and applied in this case. Such statute was only meant to apply to cases, where, by some rule or regulation or statute, a statement was required to be made. It was not meant to apply to any questions asked by any investigator or employee in any Department of the Government.

IV.

The evidence was insufficient to support the verdicts. The Court of Appeals in failing to write an opinion on counts one, three and five virtually conceded that the evidence was insufficient on those counts. As to count six—Executing a document prepared by someone else does not prove the making of a false statement in a matter within the Department. Under

the first part of Section 1001 the execution of the document might be an offense, but only if the indictment alleged it is material which allegation was lacking in this indictment. Petitioner was therefore tried for a part of the statute of which he was not actually charged in violation of due process. (*Cole v. Arkansas*, 333 U. S. 18, as to the charge itself the evidence was insufficient. Executing a document is not making a statement. The statute needs this court's clarification.

V.

Section 3486 of Title 18 gave the petition statutory immunity from use of any evidence which the Senate Kefauver Committee had subpoenaed and produced under compulsion, regardless of whether the Internal Aevenue Bureau or the Government had the same information independently. Section 3486 does not make immunity depend upon whether the government already has the information and whether the same is compelled to be produced by the Senate Committee. Exhibit 20, which was the basis of Count Six of the indictment upon which the appellant stands convicted and on which the Court of Appeals affirmed the judgment, was compelled to be produced before the Senate Kefauver Committee, and its use in the criminal trial was inadmissible and immunity resulted. This is an important question of criminal law and in reference to congressional investigations which has not been, but should be, determined by this Honorable Court.

VI.

The petitioner, having been compelled under the Statute of the United States to appear before the Kefauver Committee, was entitled to complete immunity under the Fifth Amendment to the Constitution of the United States and which could not compel his testimony without giving immunity as broad as the compulsion.

The question is one of fundamental importance in the conduct of Congressional investigation. At the last session of Congress more than one hundred Congressional investigations were in progress. Too, Section 192 makes it a crime to refuse to appear and testify. The Court should determine the important question involved.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT. THE VERDICT AND JUDGMENT ARE CONTRARY TO THE LAW AND THE EVIDENCE.

The evidence uncontradicted shows that the defendant did not make a statement but merely executed a document. It does not show that the matters therein set forth were in any wise material, nor was there then anything pending in respect to the statement itself within the Department of Internal Revenue.

VII.

Televising of petitioner before the Kefauver Committee and its subsequent criminal trial thereafter is such an atmosphere of bad publicity as to deny the petitioner a fair trial.

In the case of a tax collector another circuit has held that excessive publicity denied the collector a fair trial. The Circuit Court's opinion in this case is in conflict, holding that the defendant had a fair trial.

VIII.

Summarizing exhibits on television by the prosecutor during the trial of the case, giving and reenacting courtroom scenes, denied the appellant fair trial. It was not necessary for the appellant to prove the actual effect upon individual jurors. This is a novel question important in criminal cases and this court under its

supervisory power should grant certiorari and hold such procedure forbidden.

IX.

This court should determine under its supervisory power whether the rule established by the Ninth Circuit of affirming all counts if one count is held good should now be held as a denial of fundamental rights or overruled, since consequences flow from such a holding both as to reconsideration of sentence, probation, parole, and future licensing in states requiring licenses for numerous professions; it also affects future possible employment.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and review and reverse the judgments below and hold that the petitioner was granted statutory immunity, and therefore order the indictment and case dismissed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. .....

MICHAEL (MICKEY) COHEN,)
Appellant,)
vs.)
UNITED STATES OF AMERICA,)
Appellee.)

MOTION FOR LEAVE TO PROCEED UPON THE TYPEWRITTEN RECORD ON APPEAL

COMES NOW Michael (Mickey) Cohen and moves this Honorable Court for leave to proceed upon the typewritten record on appeal as was done in the United States Court of Appeal for the Ninth Circuit, and in respect thereto we set out as follows:

The petitioner herein is presently confined and has been confined in the penitentiary at McNeil's Island, Steilacoom, Washington, and is without funds and means to pay for the printing of the record. That whatever assets he had were seized at the time of the petitioner's indictment by the Internal Revenue Department and sold. That there is a complete Reporter's Transcript which has been filed with this court and another copy is being sent to the Solicitor General, and there is a third copy still in the Court of Appeals which is available to be sent to this Honorable Court if this Honorable Court wishes to send for it.

Furthermore, we have lodged with this Court the briefs of petitioner that were filed with the Court of Appeals and therein we set out in an appendix a complete summary of the testimony of each and every witness. In reference to the matters referred to in counts one, three and five, we have set out *in haec verba* the testimony relied upon by the government as the starting point of the so-called "net worth statement" of petitioner.

WHEREFORE, your petitioner prays that this Honorable Court grant leave to proceed upon the typewritten record on appeal and the briefs and supplemental briefs filed in this Honorable Court together with this petition.

Most respectfully,

MORRIS LAVINE,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 646

MICHAEL (MICKEY) COHEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 142-153)[1] is reported at 201 F. 2d 386. Earlier opinions of the Court of Appeals relative to petitioner's application for release on bail pending appeal are *Ex parte Cohen,* 191 F. 2d 300, and *Cohen* v. *United States,* 192 F. 2d 933, certiorari denied, 342 U. S. 947.

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[1] Petitioner has requested leave to proceed in this Court on a typewritten record containing thirteen volumes. (Pet. 31-32). The pagination of Volume I runs from 1 to 155. The pagination of Volume II through Volume XIII runs from 1 to 2050. References to Volume I will be designated as "R." References to the other volumes will be designated as "Tr."

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 154), and the petition for rehearing was denied February 4, 1953 (Tr. 2049). The petition for a writ of certiorari was filed on March 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether a fraudulent net worth statement, not required by any law or regulation but voluntarily submitted by petitioner to internal revenue agents who were investigating his income tax liability, constituted a false statement punishable under 18 U.S.C. 1001.

2. Whether 18 U.S.C. 1001, the general false statements statute, has been superseded, insofar as it relates to internal revenue matters, by the enactment of Section 3809 of the Internal Revenue Code, which penalizes certain specific false statements made in connection with internal revenue affairs.

3. Whether petitioner's testimony before the Kefauver Committee rendered him immune from the present prosecution; and whether the net worth statement, Government's Exhibit 20, a copy of which may have been used by the Committee in questioning petitioner, should have been excluded at the trial.

4. Whether the evidence was sufficient to support the verdict.

STATUTES INVOLVED

18 U.S.C.:

SEC. 1001. Statements or entries genera dic-

Whoever, in any matter within the ju ted
tion of any department or agency of the U on-
States knowingly and willfully falsifies de-
ceals or covers up by any trick, scheme, ti-
vice a material fact, or makes any false, ta-
tious or fraudulent statements or repres or
tions, or makes or uses any false writi any
document knowing the same to contai or
false, fictitious or fraudulent stateme or
entry, shall be fined not more than $10,0 th.
imprisoned not more than five years, or im-

SEC. 3486. Testimony before Congress
munity

No testimony given by a witness b fore
either House, or before any committee of her
House, or before any joint committee tab-
lished by a joint or concurrent resoluti of
the two Houses of Congress, shall be sed
as evidence in any criminal proceeding a inst
him in any court, except in a prosecutio for
perjury committed in giving such testi ony.
But an official paper or record produc l by
him is not within the said privilege.

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * *

(b) Failure to Collect and Pay Over Tax, or
Attempt to Defeat or Evade Tax.—Any p rson

required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

SEC. 3809 Verification of Returns; Penalties of Perjury [as added by Sec. 4, Act of August 27, 1949, c. 517, 63 Stat. 666].

(a) *Penalties.*—Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) *Signature Presumed Correct.*—The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

(c) *Verification in Lieu of Oath.*—The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required.

(26 U. S. C. 1946 ed., Supp. V. Sec. 3809.)

STATEMENT

On April 6, 1951, a six-count indictment was filed against petitioner and his wife in the United States District Court for the Southern District of California. Counts One, Three, and Five (R. 1-2, 4, 6) charged petitioner with wilful attempted evasion of income taxes for the years 1946, 1947, and 1948, respectively, in violation of Section 145(b) of the Internal Revenue Code. Count Six (R. 7-8) charged petitioner with submitting false statements on a matter within the jurisdiction of the Treasury Department in violation of 18 U. S. C. 1001, in that during the course of a determination of his income tax liability he submitted a fraudulent net worth and expenditures statement purporting to show that he had borrowed $172,500 and had disbursed $244,163.15 from 1946 through 1948, whereas he well knew that he had borrowed not more than $23,000 and had disbursed not less than $343,139.34. After a jury trial, petitioner was con-

victed on these four counts[2] (R. 87-89), and on July 9, 1951, he was sentenced to concurrent terms of imprisonment for five years on each count and fined $10,000 (R. 95, 97-98; Tr. 2011-2012). Since the sentences were concurrent, the Court of Appeals affirmed the conviction upon finding that the conviction under Count Six, the false statements count, was free from error. (R. 144.)

On November 17, 1950, six months prior to the return of the present indictment, petitioner appeared under subpoena before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee). (R. 12.) At the outset he was informed by the chairman that he could object to any question which he felt would incriminate him under federal law. (R. 13-14.) Petitioner's counsel stated that petitioner was under investigation by the Bureau of Internal Revenue and said (R. 16; see R. 15-17, 27):

> On behalf of my client I would like to claim all the benefits of the immunity statutes as to any questions asked here. I am not talking about self-incrimination, but the immunity statute which deals with witnesses before Congressional committees.

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[2] Counts Two and Four (R. 2-3, 5) charged both petitioner and his wife with wilful attempted evasion of the wife's income taxes for the years 1946 and 1947. The wife was also included in Count Five. (R. 6.) During the course of the trial, Count Five was dismissed as to the wife, and Counts Two and Four were dismissed entirely. (R. 68; Tr. 1337-1338.)

The chairman replied that petitioner would have to claim his immunity by objecting to the specific questions asked and that he would have no immunity if he answered without being directed to do so. (R. 16-17.) Petitioner thereafter answered numerous questions relative to his financial transactions during the period from 1945 through 1948.[3] He made no objection to any of these questions, except to repeat his general claim to immunity from prosecution insofar as the questions dealt with his income tax liability. (R. 17-27.)

Prior to trial, petitioner filed a "motion to dismiss and grant appropriate relief" (R. 10-11), together with a supporting affidavit (R. 12-29). He alleged that the questions he had answered before the Kefauver Committee were pertinent to the counts of the present indictment; and he requested either that the indictment be dismissed on the ground that his testimony under subpoena before the Committee rendered him immune from such prosecution, or that all the evidence "arising out of questions" which he answered be excluded from the trial. (R. 12-13, 28-29.)

The Government submitted two affidavits in opposition to the motion. Special Agent Goodykoontz of the Treasury Department stated that he began a preliminary investigation of petitioner's tax liability in September, 1946; that he was officially assigned to investigate the case in Septem-

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[3] In asking the questions the Committee's counsel was using a memorandum which had been brought in by petitioner's auditor in response to a subpoena. (R. 16, 26.)

ber, 1949; that he ceased active investigation and began to write his report on November 14, 1950; and that all the information used as a basis for the present indictment had already been obtained prior to petitioner's appearance before the Committee on November 17, 1950. (R. 30-32.) The United States Attorney stated that he had not used any information derived from petitioner's testimony before the Committee in connection with the indictment, and that he did "not intend to use any portion of the testimony given or information derived therefrom, directly or indirectly, in the prosecution of this case." (R. 33-34.)

On June 1, 1951, the motion was denied without prejudice (R. 35); it was renewed at the trial, after the Government had addressed the first question to its first witness, and was denied without further discussion (R. 41; Tr. 87-88). No specific item of evidence introduced by the Government was objected to on the ground that it had been derived from the testimony of petitioner before the Committee. During the trial, Agent Goodykoontz repeated in substance the statements he had made in his affidavit. (Tr. 1389.) The motion was formally renewed after all the evidence was in and was again denied without argument.[4] (R. 82; Tr. 1860.)

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[4] The court's refusal to grant the motion was one of the points raised in the motion for a new trial. (R. 91-92, 95 and Tr. 1993, 2010-2011; cf. R. 110-112, 118-119 and Tr. 2020-2026.) At one point, in response to counsel's assertion that the testimony given before the Kefauver Committee had been used during the trial, the court said (Tr. 2022):

> I beg to differ with you, counsel, in that respect. I was interested in that point and I relied upon the affi-

The evidence to support the verdict may briefly be summarized as follows:

In August, 1949, Agent Goodykoontz was assigned by the Bureau of Internal Revenue to investigate petitioner's income tax returns. (Tr. 1388-1389.) At a conference in September, 1949, between petitioner, his tax consultant, Sackman, and two agents, petitioner's returns for 1945 through 1948 were discussed. Some of petitioner's canceled personal checks were turned over and the agents were told that the records of three business enterprises in which he had an interest would be made available to them.[5] (Tr. 265-275, 1399-1405.) During the next two months the agents visited these business places and petitioner permitted them to examine the records in the office. (Tr. 1402-1405.) In December two agents visited petitioner at his home and obtained his signature to a waiver of the statute of limitations on the collection of his income taxes for 1945 and 1946 in order that the investigation might be continued. (Tr. 127-131.) About December 10, 1949, Agent Goodykoontz

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davits that were furnished me with the motion and I watched the testimony very carefully to see whether or not the source of any information offered in this case arose from that hearing.

You will find in the record where some reference was made to the Kefauver Committee at one time and I stopped it immediately.

[5] During the conference Sackman pointed out (Tr. 277-278) that the Bureau had previously investigated petitioner's return for 1940 because he had spent much more than he reported; that petitioner had explained that he had borrowed from many people; and that the investigation was dropped after petitioner's story was checked and found to be true.

asked Sackman for a statement of petitioner's net worth. (Tr. 1399.)

On January 3, 1950, a conference took place between petitioner, Sackman, and two agents. (Tr. 131-132, 1390.) Sackman produced an original and two copies of a net worth statement and handed one to the agents. (Tr. 132, 1391.) According to this statement petitioner had borrowed large sums from various individuals during the years 1945 through 1948 and had repaid only a small fraction. In 1945 he allegedly borrowed about $25,000 of which only $5,000 was repaid; in 1946 he borrowed $5,000; in 1947 he borrowed over $150,000 and repaid $15,000; in 1948 he borrowed about $55,000 and repaid $25,000.[6] He was questioned at length about his creditors and the circumstances of these alleged loans, and was warned by the agents of the serious nature of the document he was submitting to them. (Tr. 137-143, 1391-1398.) Petitioner signed all three copies and told the agents that he would swear, by a somewhat unorthodox oath, that everything contained in the statement was true and that he would not cheat the Government. (Tr. 143, 149, 1397-1398.) The original and one copy were given to the agents and the other copy was retained by Sackman. (Tr. 143, 149.)

Evidence was intoduced to contradict the alleged loans. Five of the purported creditors, Harry

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[6] The statement, Government's Exhibit 20, was read into the record. (Tr. 201-205.) It is reproduced in the Appendix, (*infra*, pp. 24-25).

Rothman, Yolnosky, Siegal, Coplin,[7] and Hudkins, were dead and their estates revealed no evidence of money owed them by petitioner. (Tr. 283, 289-291, 875-885, 950-1009, 1135-1137, 1298-1299, 1356-1359, 1605-1610.) Three others, Seltzer, Schuster, and Brown, testified either that they had made no such loans, or that such loans as they had made had been repaid. (Tr. 158, 755, 757, 851-852.) Seltzer and Brown testified further to schemes concocted by petitioner to make it appear that he was indebted to them. (Tr. 158-193, 852-856.) It was shown that Stampanato was unemployed and was being supported by his wife in 1948 when he purportedly loaned petitioner $12,000 and that he could not have borrowed the money from a third party. (Tr. 1632-1637, 1848-1849.)

Approximately 100 witnesses testified to expenditures made by petitioner and his wife during the years 1946, 1947, and 1948. In November, 1945, petitioner had told two police officers that he was "broke" (Tr. 409-413, 1278), and his own net worth statement showed that, as of December 31, 1945, he had assets in the neighborhood of $30,000 and liabilities of about $20,000 (see Appendix, *infra*, pp. 24-25). The witnesses testified that during

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[7] During the investigation petitioner told the agents that Coplin regarded him as a son and during a conversation in 1945 gave him a series of checks to use as needed, amounting to $42,500 in all. He produced an unleashed check for $5,000 explaining that it was the last of the series. (Tr. 138-140, 1392-1394.) It was shown that a stop order had been issued against this particular check (Tr. 985-986), that Coplin kept careful records (Tr. 976-979), and that there was no record of any series of checks to petitioner (Tr. 967-971, 982-983).

the next three years petitioner and his wife spent $345,933.53.[8] A comparison of the taxable income reported by petitioner and his wife on their returns (see Appendix, *infra*, pp. 24-25) with that computed by the agent on the basis of the evidence of expenditures (Tr. 1476-1480) is as follows:[9]

	Per Return	*Per Evidence*
1946	$15,010.62	$ 30,815.91
1947	29,483.90	198,868.45
1948	27,293.00	116,681.64
Totals	$71,787.52	$346,366.00

The agent's computation of unreported income on this basis was corroborated by other computations made on the basis of direct income received and on the basis of bank deposits. (Tr. 1436-1451.)

ARGUMENT

Since petitioner received concurrent sentences on all four counts and the Court of Appeals found no error which would necessitate a reversal as to Count Six, the false-statement count, it was proper to affirm the conviction without consideration of alleged errors as to the evasion counts. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; cf. *Pinkerton* v. *United States*, 328 U.S. 640, 641-642. The

[8] Agent Goodykoontz, testifying as an expert, summarized the testimony of the "expenditures" witnesses for the jury. (Tr. 1451-1480.)

[9] For adjustments of the figures for 1946 and 1947, as a result of the dismissal of the two counts dealing with Mrs. Cohen's returns for these two years, see Tr. 1515-1519.

judgment is supported by Count Six, and it is unnecessary to deal at length with the questions raised in the petition (Pet. 10-11, 12, 16-17, 23-24, 26-27, 30) as to the validity of the conviction with respect to Counts One, Three and Five.

1. Petitioner contends (Pet. 14, 15-16, 17-21, 26) that he was not required by any law, rule or regulation to turn over the net worth statement to the agents, and that it was not, therefore, a false statement within the meaning of 18 U.S.C. 1001 (*supra*, p. 3). He argues further that if the statute is construed to include such a statement, it is unconstitutional for vagueness and indefiniteness.

The language of the statute provides no support for the narrow construction urged by petitioner. In *Marzani* v. *United States*, 168 F. 2d 133, 142 (C.A. D.C.),[10] a similar contention was rejected in the following language:

> The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to "any false or fraudulent statements or representations, * * * in any matter within the the jurisdiction of any department or agency of the United States". In *United States* v. *Gilliland* [312 U.S. 86, 93], the Supreme Court observed: "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might re-

[10] Affirmed by an equally divided Court, 335 U.S. 895, adhered to on rehearing, 336 U.S. 922.

sult from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction."

We see nothing vague about the language "false or fraudulent statements or representations" nor any ambiguity in the language "in any matter within the jurisdiction of any department or agency of the United States" which would place in doubt the requirement that a government employee, discussing officially with his superior an official request for his resignation, must be truthful. * * *

Petitioner relies heavily (Pet. 16, 18-19) upon this Court's use of the word "required" in two passages in *United States* v. *Gilliland*, 312 U.S. 86, 95, 96.[11] But there the Court did not have the present problem before it, for the reports involved in that case actually were required by law and by regulation. Moreover, the quotation from the *Gilliland* opinion upon which the Court of Appeals relied in the *Marzani* case clearly indicates that this Court read the statutory language, "in any matter within the jurisdiction of any department", as referring to statements submitted in *any* matter involving the "authorized functions" of the department in question, and not merely to those which were *required* by law or regulation to be made. During the present term this Court handed down an opinion in which one of the fundamental assumptions was that a false oral statement made to Treasury repre-

[11] It should be noted that one of these passages is misquoted by petitioner. Compare 312 U.S., p. 95 with page 16 of the Petition for a Writ of Certiorari.

sentatives during a conference on income tax liability would constitute an offense under 18 U.S.C. 1001. *United States* v. *Beacon Brass Co.*, 344 U.S. 43. See also *United States* v. *Zavala*, 139 F. 2d 830, 831-832 (C.A. 2d).

Nor can it be said (see Pet. 19) that petitioner was unaware of the serious nature of the net worth statement. He had previously experienced investigation by the Bureau of Internal Revenue. He had known for almost four months that his returns for 1945 through 1948 were under investigation. He had had several conferences with the agents and had turned over his records to them. His tax consultant, with whom he must have been in touch, had been asked for the net worth statement. And he discussed the contents of the statement at length with the agents before signing it, was warned of its serious nature, and assured them that it was a true statement. He was well aware that he was giving them information on a matter which they had jurisdiction to investigate. Certainly, the statute is not rendered vague or indefinite by an interpretation which requires a person undergoing such an investigation to be truthful in the statements he submits to the agents.[12]

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[12] Petitioner urges (Pet. 15, 17) that the indictment was defective because it failed to allege that the statement was "material." The indictment alleged (R. 7-8) that petitioner's income tax liability was being investigated by the Treasury and that he submitted a false statement as to his loans and expenditures. The facts alleged were obviously sufficient to show the materiality of the statement. *Hagner* v. *United States*, 285 U. S. 427; *Chevillard* v. *United States*, 155 F. 2d 929, 932-933 (C.A. 9).

2. Petitioner contends (Pet. 12, 14-15, 17-18, 25-26) that 18 U. S. C. 1001 has been superseded, insofar as it relates to internal revenue matters, by Section 3809 of the Internal Revenue Code (*supra*, pp. 4-5), which was enacted in 1949. The basis of his contention is that the Internal Revenue Code is "all-inclusive" with respect to offenses involving the submission of false statements pertaining to internal revenue matters, and that such offenses are now punishable only under Section 3809 of that Code, which makes it a felony to submit false returns, statements, and documents containing or which have been verified by declarations that they were made under the penalties of perjury. From this premise he ingeniously argues that the submission of the false statement involved in Count Six could not be an offense under 18 U.S.C. 1001, and that since his statement did not contain and was not verified by a declaration that it was made under the penalties of perjury, as required by Section 3809, he committed no offense whatever in submitting it.

An argument analogous to that now advanced by petitioner was rejected by this Court in *United States* v. *Noveck*, 273 U. S. 202. In that case, the defendant, who had been indicted for perjury in connection with his income tax returns, contended that the general perjury statute had been supplanted by Section 253 of the Revenue Act of 1918, 40 Stat. 1057, 1085 (now embodied in Section 145 (b) of the Internal Revenue Code, *supra*, pp. 3-4),

which provided for the punishment of any one who wilfully attempted to evade his income taxes in any manner.[13] This Court held that the two statutes described different offenses, and that there was nothing in the history of the revenue legislation to indicate a Congressional intention to repeal the general perjury statute.

Petitioner's contention (Pet. p. 17) that the provisions of the Internal Revenue Code, as amended by the addition of Section 3809, were intended to be "all-inclusive" with respect to prosecutions for the submission of false statements also appears to be at variance with the later pronouncement of this Court in the recent case of *United States v. Beacon Brass Co., supra.* In that case, this Court after adhering to the doctrine of *United States v. Noveck, supra,* that where different proof is required for each offense a single act or transaction may violate more than one criminal statute, then said (page 46): "By providing that the sanctions of [26 U.S.C.] § 145(b) should be 'in addition to other penalties provided by law,' Congress

[13] At that time the revenue law required that income tax returns be made under oath. See Section 223 of the Revenue Act of 1918 (40 Stat. 1057, 1074). Effective January 1, 1942, the oath-requirement provision for individual income tax returns was eliminated from the Internal Revenue Code and a new provision was inserted in its stead, which requires that every individual income tax return shall contain or be verified by a written declaration that it is made under the penalties of perjury. See Section 136 of the Revenue Act of 1942 (56 Stat. 798, 836) amending Section 51 of the Internal Revenue Code. Thus, the statutes considered by this Court in the *Noveck* case both concerned matters which were required to be under oath.

ognized that some methods of attempting to evade taxes would violate other statutes as well."

It is plain that the two statutes involved in the case at bar prescribe different offenses, since it is undeniable that different proof is required to establish an offense under each statute. Thus, in order to establish an offense under Section 3809, it must be shown that the false return, statement, or other document involved contains or is verified by a declaration that it was made under the penalties of perjury, while an offense under 18 U.S.C. 1001 may be established by merely showing that the statement was made in a matter within the jurisdiction of the pertinent department or agency. In the circumstances there is no merit to petitioner's contention that Section 3809 of the Internal Revenue Code superseded 18 U.S.C. 1001,[14] and

[14] The legislative history of Section 3809 shows clearly that its purpose was not to make it an all-inclusive provision governing the punishment for submitting false returns and statements in connection with internal revenue matters, but to relieve taxpayers of the burden of notarizing corporate, fiduciary, partnership, estate, and gift-tax returns and such other statements and documents as were then required to be filed under oath, and to permit them to be filed in the same manner as individual income tax returns had been permitted to be filed since 1942, *i.e.*, over a declaration that they were made under the penalties of perjury. See Senate Report No. 685, 81st Cong., 1st sess, p. 3, which reads as follows:

> This section [Section 3809] gives the Commissioner authority to eliminate the oath in the case of corporate, fiduciary, partnership, estate, and gift-tax returns, and other returns or statements. The present law eliminates the oath in the case of individual income-tax returns and employment-tax returns. These changes will not only relieve the taxpayers of the burden of notarizing their returns but will expedite the processing by the Bureau of returns which might otherwise have to be sent back for compliance with the oath requirement.

we submit that the court below correctly disposed of the contention in saying (R. 150-151):

> We find nothing in the language or legislative history of 26 U.S.C.A. Sec. 3809 which convinces us that Congress intended by enactment of this statute to decrease the scope of 18 U.S.C.A. Sec. 1001. "If Congress had intended to repeal the law here challenged, it would have been a simple matter to give expression to such intent." *Ex parte Berkoff* [65 F. Supp. 976, 980 (D. Minn.)] Enactment of 26 U.S.C.A. Sec. 3809 was accompanied by express repeal of certain other laws. [26 U.S.C.A. Secs. 51(d), 145(c) and 1630. Act of August 27, 1949, c. 517, Sec. 4(b), 63 Stat. 668.] Yet there was no mention of Sec. 1001 of Title 18, U.S.C.A. We think the congressional intent in enacting Sec. 3809 was merely to simplify the task of both taxpayer and the Bureau of Internal Revenue by permitting a verified return to be substituted for a notarized return in certain situations. Section 3809(a) was apparently intended to take the place of 26 U.S.C.A. Sec. 145(c), which was repealed. The statutes in question describe different offenses. 18 U.S.C.A. Sec. 1001 prohibits knowing and wilful oral or written false statements made in a matter within the jurisdiction of any department or agency. 26 U.S.C.A. Sec. 3809 is concerned with the verification of a written return, statement or other document which is not believed to be true and correct as to every material matter. [footnotes omitted.]

3. Petitioner contends (Pet. 15, 22, 27-28) that his testimony before the Kefauver Committee rendered him immune from prosecution in this case; or, at least, that the net worth statement, Government's Exhibit 20, should have been excluded from the evidence.

An original and two copies of the net worth statement were signed by petitioner on January 3, 1950. The original and one copy were turned over to the agents. Petitioner's tax consultant, Sackman, retained the other copy. Exhibit 20, the copy introduced in evidence at the trial, was never before the Kefauver Committee. If any one of the three copies was actually before the Committee at the hearing on November 17, 1950, it was the copy which had been retained by Sackman.[15] Petitioner appeared before the Committee and was warned at the outset that he would not be required to answer any question which would tend to incriminate him. But he did not avail himself of that privilege. Instead, he voluntarily answered the questions and claimed that by so doing he had obtained immunity from prosecution. Obviously petitioner's purpose in testifying was to prevent the Government from using in a prosecution evidence it had long previously obtained.

Petitioner gained no immunity from prosecution by the testimony given by him before the Com-

[15] All the record shows is that "a memorandum", which Sackman had delivered in response to subpoena, was being used by the Committee's counsel in his questioning of petitioner with regard to the large sums he had allegedly borrowed. (R. 16, 26.)

tee. We find no authority, in the Constitution, the statutes, or in the decided cases for such a proposition. Immunity from prosecution arises where a witness can be forced to give testimony which would incriminate him. *Brown* v. *Walker*, 161 U.S. 591. But petitioner, although forced by subpoena to *appear* before the Committee, was clearly not forced to *testify* as to any matters which would tend to incriminate him. There was no statute here, as in *Smith* v. *United States*, 337 U.S. 137, and *United States* v. *Monia*, 317 U.S. 424, which specifically prohibited *prosecution* on account of any matter concerning which petitioner testified. He could, therefore, have refused to answer any incriminating question without becoming subject to punishment for contempt. *Counselman* v. *Hitchcock*, 142 U.S. 547.

Petitioner was not entitled to the exclusion of Exhibit 20 at the trial. In the first place, it may be doubted whether any proper objection was made. This was not illegally seized evidence and petitioner's pre-trial motion was premature as an objection to evidence. And when Exhibit 20 was introduced, there was no objection to it on this score. Furthermore, as the trial judge pointed out (Tr. 2022), none of the evidence introduced by the Government at the trial had been derived from petitioner's testimony before the Committee. It had already been in the Government's hands for some time. The purpose of 18 U.S.C. 3486 (*supra*, p. 3), upon which petitioner relies, was to compel

the production of testimony which had previously been unavailable to the Government. The construction advanced by petitioner would be a departure from the Congressional intent. See *United States* v. *Bryan*, 339 U.S. 323, 335-338.

4. Petitioner contends (Pet. 16, 23-24, 26-27, 29) that the evidence was insufficient to support the verdict. The summary of the evidence set forth in the Statement, *supra*, pp. 9-12, clearly establishes that petitioner knowingly submitted to the revenue agents a false net worth statement, being well aware that they were investigating his income tax liability and that they would use the statement in connection with their investigation.[16] Although the court below did not pass on the question of the adequacy of the evidence to support the conviction on Counts One, Three, and Five, we submit that there can be no reasonable question that the evidence (see Statement, *supra*, pp. 11-12) was amply sufficient to show that petitioner wilfully attempted to evade his income taxes for the years 1946, 1947, and 1948 in the manner alleged.

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[16] Petitioner's contention (Pet. 11, 15, 23, 29-30) that prejudicial error was committed by reason of a television program which occurred in the evening during the course of the trial, is without substance. There is not a word in the record concerning that program, petitioner's counsel having made no objection to it, and there is nothing to show that any of the jurors saw the program, or that they were influenced by it if they did see it.

CONCLUSION

The decision below is clearly correct, and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOHN R. BENNEY,
Attorney.

APRIL, 1953.

APPENDIX

EXHIBIT 20

Michael (Mickey) Cohen

Net Worth Statement — Years 1945–1946–1947–1948

YEAR 1945

Cash on Hand Jan. 1, 1945		$ 2,500.00
La Vonne Cohen Savings		8,000.00
Earnings as per 1945 Income Tax Return		12,266.59
Borrowed from Harry Rothman		7,500.00
Borrowed from Tony Pallazollo		3,500.00
Borrowed from Jake Coplin		7,500.00
Borrowed from Eli Lubin		1,000.00
Borrowed from Charles Schuster		5,000.00
		$ 47,266.59
Repaid loan from Charles Schuster	$ 5,000.00	
Disbursements as per schedule	39,155.77	44,155.77
Cash on Hand December 31, 1945		$ 3,110.82

YEAR 1946

Cash on Hand Jan. 1, 1946		$ 3,110.82
Earnings as per 1946 Income Tax Return		15,010.62
Borrowed from Harry Rothman		5,000.00
		$ 23,121.44
Disbursements as per schedule		21,206.04
Cash on Hand December 31, 1946		$ 1,915.40

YEAR 1947

Cash on Hand Jan. 1, 1947		$ 1,915.40
Earnings as per 1947 Income Tax Return		29,483.90
Borrowed from Arthur Seltzer		25,000.00
Borrowed from Charles Yolnosky		15,000.00
Borrowed from Jack Bowden		15,000.00
Borrowed from Charles Schuster		10,000.00
Borrowed from Babe McCoy		5,000.00
Borrowed from Brown		5,000.00
Borrowed from Sam Rothman		3,000.00
Borrowed from Harry Rothman		15,000.00
Borrowed from Benjamin Siegel		25,000.00
Borrowed from Jake Coplin		35,000.00
		$184,399.30
Repaid loan from Jack Bowden	$ 15,000.00	
Disbursements as per schedule	143,480.94	158,480.94
Cash on Hand December 31, 1947		$ 25,918.36

YEAR 1948

Cash on Hand Jan. 1, 1948		$ 25,918.36
Earnings as per 1948 Income Tax Return		27,293.00
Borrowed from Morrie Orloff		10,000.00
Borrowed from Brown		25,000.00
Borrowed from Johnny Valentine (Stampanato)		12,000.00
Borrowed from Art Hudkins		2,500.00
Borrowed from Hymie Miller		5,000.00
		$107,711.36
Repaid loan from Brown	$ 25,000.00	
Disbursements as per schedule	79,476.17	104,476.17
Cash on Hand December 31, 1948		$ 3,235.19

I, Michael (Mickey) Cohen, have read and examined the foregoing statement of Receipts and Disbursements together with the accompanying schedule of Disbursements, and to the best of my knowledge and belief, same are true and correct.

Michael Mickey Cohen

Michael (Mickey) Cohen

Disbursements	Years 1945-1946-1947-1948 1945	1946	1947	1948
9938-1/2 Robbins Drive—Rent $125.00 per month	$ 1,500.00	$ 1,500.00	$ 375.00	$ -0-
Food	2,600.00	2,600.00	2,600.00	2,600.00
Clothing (wife)	800.00	900.00	900.00	900.00
Clothing (husband)	1,500.00	1,500.00	3,000.00	3,000.00
Furs	2,250.00	-0-	5,400.00	-0-
Jewelry (wife)	-0-	1,000.00	4,576.00	3,260.00
Jewelry (husband)	-0-	3,964.92	9,052.22	-0-
Automobiles	2,000.00	3,000.00	7,500.00	7,500.00
Outside Entertaining	250.00	1,500.00	1,500.00	500.00
Gifts	-0-	-0-	1,200.00	1,560.00
Servants	500.00	500.00	500.00	500.00
Miscellaneous (wife)	500.00	1,500.00	1,500.00	1,500.00
Miscellaneous (husband)	-0-	-0-	720.00	960.00
Gardener	-0-	-0-	33,500.00	-0-
Cost of House				
Cost of Furniture & Renovations & House Repair	-0-	-0-	48,880.34	-0-
Medical & Dental	250.00	260.00	500.00	1,000.00
Business Loans & Investments	25,631.46	-0-	13,606.52	49,594.71
Federal & State Taxes Paid	1,374.31	2,981.12	8,170.86	6,601.46
Totals	$39,155.77	$21,206.04	$143,480.94	$79,476.17

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